Supreme Court, U. S.
FILED
FEB 4 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

JOSEPH D. BLOCK
PETER P. GARAM
4 Irving Place
New York, New York 10003
Tel. No. (212) 460-2777

Attorneys for Appellant

TABLE OF CONTENTS

PAGE

I The Court of Appeals Erred in Holding That the Commission's Ban Is Not a Content-Based Regulation. 1

II The Commission's Ban Has Not Been Justified by a Sufficient Governmental Interest. 4

"Avoidance Of A Captive Audience." 5

"Allocation Of Limited Space." 6

"Elimination Of Free Ride And Forced Subsidy." 6

"Avoidance Of A Public Forum." 10

III The Commission's Ban Cannot Be Sustained on the Ground That It Extends Only to One Manner of Communication. 12

IV The Commission's Ban Is Unconstitutionally Vague. 13

CONCLUSION 14

TABLE OF AUTHORITIES

Cases:

Abood v. *Detroit Board of Education,* 431 U.S. 209 (1977) 7, 8, 13

Bonner-Lyons v. *School Committee of Boston,* 480 F.2d 442 (1st Cir. 1973) 11

Buckley v. *Valeo,* 424 U.S. 1 (1976) 7, 10

City Ice and Fuel Co. v. *Public Service Commission,* 260 A.D. 537 (3d Dep't 1940), *motion for leave to appeal denied,* 261 A.D. 847 (3d Dep't 1941) 9

PAGE

Cohen v. *California*, 403 U.S. 15 (1971) 6

East Meadow Community Concerts Association v. *Board of Education*, 18 N.Y.2d 129 (1966) 11

Elrod v. *Burns*, 427 U.S. 347 (1976) 2, 7

First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) 2, 3, 4

Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974) 10

Railway Employees' Department v. *Hanson*, 351 U.S. 225 (1956) 7

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 13

Thomas v. *Collins*, 323 U.S. 516 (1945) 11

United Mine Workers of America v. *Illinois State Bar Association*, 389 U.S. 217 (1967) 6

Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) 4

Statute and Regulation:

N.Y. Public Service Law §65(3) 9

16 NYCRR, Ch. II, Subch. F, Account 426.4 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

I

The Court of Appeals Erred in Holding That the Commission's Ban Is Not a Content-Based Regulation.

Appellee's brief defends the decision of the court below on essentially the same grounds, and in reliance on the same authorities, as are set forth in the court's opinion. Thus, Appellee argues that its bill insert ban is not content related and is a valid time, place and manner restriction (Br. at 8-14). We addressed these issues at pages 12-17 of our initial brief to this Court and find no need to repeat our arguments here. In our view, a prohibition expressly directed to speech on controversial matters of

public policy is plainly and inescapably based on content and cannot be the subject of a constitutional time, place and manner regulation. It was the erroneous holding of the court below on this issue that served as the basis upon which the Commission was relieved of complying in that court with the standards established by this Court for justifying a prohibition on expressive activity of the kind here involved. Those standards require that such a prohibition must survive exacting scrutiny, that encroachment upon freedom of speech cannot be justified upon a mere showing of a legitimate state interest but the interest advanced must be of vital and compelling importance, and that the burden is on the state to show the existence of such an interest. *Elrod* v. *Burns,* 427 U.S. 347, 362 (1976); *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 786 (1978). The Commission has not met these standards in this case.

The Commission's brief also seeks to sustain the decision of the court below by the novel argument that, notwithstanding the broad sweep of the bill insert ban, "There simply has been no attempt on the part of the Commission to suppress free speech by utilities." Br. at 10 n.4. We find no authority for the proposition that a content-based suppression of speech can be cured of its constitutional infirmity by the state's disavowal of an intent to violate the First Amendment. Whatever the Commission's intent may have been, the *effect* of its order was, and continues to be, a severe abridgment of Con Edison's freedom of expression.

The Commission asserts that its bill insert ban is "neither content neutral nor content based." Br. at 11. Yet the Commission follows this statement with the claim that the "neutrality" of its ban distinguishes it from cases where the government has attempted to foster or suppress a

specific point of view or particular information. *Id.* Not only is this argument internally contradictory but it also appears to embody the fallacious concept that the broader the suppression, the lesser the infringement of First Amendment rights. The decisions of this Court do not permit this concept as they have consistently held that in the area of protected speech the state, even after sustaining its burden of justifying the restriction, "must employ means 'closely drawn to avoid unnecessary abridgment.'" *First National Bank of Boston* v. *Bellotti, supra,* 435 U.S. at 786 and cases cited therein.

The Commission argues that its ban does not discriminate against any one viewpoint or speaker but is an evenhanded restriction on the use of the billing mechanism (Br. at 14). The fact is, however, that the ban applies only to utilities and inhibits the expression of only the utilities' views. The State of New York, by this action of its Public Service Commission, has singled out utilities for this restriction which it has not applied to any other industry, group or person. The Commission's "evenhandedness" argument is groundless.

In summary, we believe that Point I.A. of the Commission's brief completely fails to support the caption which states that "The Commission's Regulation Is A Subject-Matter Restriction Frequently Permitted By This Court." Br. at 8. The bill insert ban is clearly a content-based restriction on freedom of speech and the court below erred in treating it as a time, place and manner regulation.[1] Under these circumstances, the ban must be declared to be invalid unless the record discloses that the Commission has sustained its burden of showing the existence of a gov-

[1] The reasons why the Commission's ban cannot be considered to be a valid time, place and manner regulation are set forth at pages 22-23 of our initial brief.

ernmental interest which will be served by the ban and which is of such vital and compelling importance as to warrant the subordination of the utilities' First Amendment rights.

II

The Commission's Ban Has Not Been Justified by a Sufficient Governmental Interest.

The Commission contends that Con Edison's status as a regulated monopoly has a "particular significance" in evaluating the sufficiency of the various state interests which the Commission has advanced. Br. at 17-18. The fact that Con Edison is heavily regulated has no relevance to First Amendment analysis. The pharmacists in *Virginia Pharmacy Bd.* were subject to what the Court characterized as "extensive regulation," yet the Court invalidated a restriction on their right to advertise the prices of prescription drugs. In so doing, the Court focused not on the source of the drug price information, but on the First Amendment values served by that information. Similarly, in *Bellotti*, the Court concluded that

> The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

First National Bank of Boston v. *Bellotti, supra,* 435 U.S. at 777.

Also, the Commission characterizes Con Edison's use of bill inserts for the expression of its views as a "non-utility purpose." Br. at 18. Nothing could be further from the truth. The Commission's order prevents Con Edison from communicating with its customers by means of bill inserts

on many vital matters directly related to their mutual interests in connection with the rendition of utility service. For example, the Commission has ruled that the subject of nuclear power is covered by its ban (J.S. App. 43a). However, for Con Edison, the owner and operator of a nuclear power plant, the subject of nuclear power is directly related to the rendition of utility service. The operation of that plant affects the safety, reliability and cost of utility service. Examples of other matters directly related to the rendition of utility service, but to which the Commission's ban probably applies simply because they are controversial, are the use of coal for boiler fuel at power plants to decrease dependency on expensive and unreliable sources of foreign oil, the need for development of synthetic fuels, new sources of natural gas and new energy technologies, the effect of environmental costs on utility rates, and other similar issues. It is essential that utility customers not be deprived of an important source of information on such topics.

The various state interests advanced by the Commission are insufficient, taken singly or in the aggregate, to justify the bill insert ban. A review of the Commission's contentions makes it plain that none of them satisfies the applicable standards established by the decisions of this Court.

"Avoidance Of A Captive Audience."

The court below treated utility customers as a captive audience whose privacy rights require protection from bill inserts espousing a utility's viewpoint on a controversial question. This was the sole governmental interest relied upon by the court to sustain the ban (J.S. App. 9a-11a). The Commission relegates this justification to second place in Point I.C. of its brief (Br. at 20). Our initial brief addresses this issue at pages 17-20 and we rest on our argu-

ment as there set forth. The Commission has wholly failed to show that the bill inserts will invade "substantial privacy interests . . . in an essentially intolerable manner." *Cohen* v. *California,* 403 U.S. 15, 21 (1971).

"Allocation Of Limited Space."

The Commission argues that its primary concern in imposing the bill insert ban was to avoid the situations where use of the inserts for the discussion of controversial public issues "would disrupt the utility billing process and deprive utility customers of service-related information by usurping the limited space available" (Br. at 18).

The Commission's fear that the prohibited bill inserts would disrupt the utility billing process is totally incomprehensible. No explanation is given by the Commission as to how inclusion of a controversial message in the billing envelope would disrupt the billing process, and why inclusion of non-controversial messages in the billing envelope would not disrupt the billing process. This argument is wholly speculative and without any record support.

Similarly conjectural is the Commission's apprehension that the use of bill inserts for the proscribed purpose will interfere with their use for providing other information to the utilities' customers. There is no support whatsoever in the record for the assumption that the utilities will permit this to happen. As this Court held in *United Mine Workers of America* v. *Illinois State Bar Association,* 389 U.S. 217, 223 (1967), speculative and theoretical possibilities of harm do not justify incursions on First Amendment rights.

"Elimination Of Free Ride And Forced Subsidy."

We disagree with the Commission's contention that the bill insert ban is necessary to prevent the utilities from

getting a "free ride" or a "forced subsidy" from their customers for the distribution of their views on controversial issues of public importance. We have stated our position at pages 20-21 of our initial brief and will discuss here only those matters raised in the Commission's brief which we have not heretofore specifically covered.

The cases cited in the Commission's brief (p. 26) do not support its contention. In *Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977), the Court held that public school teachers could not be compelled by a state-authorized agency shop agreement to pay *additional* union dues to finance certain union political activities with which they disagreed. In *Railway Employees' Department* v. *Hanson,* 351 U.S. 225 (1956), the Court upheld a union shop agreement authorized by the Railway Labor Act under which employees were compelled to pay assessments to cover the costs of collective bargaining. In *Elrod* v. *Burns,* 427 U.S. 347 (1976), the Court held that the dismissal of public employees upon the sole ground of their political beliefs violated their First Amendment rights. In *Buckley* v. *Valeo,* 424 U.S. 1 (1976), the Court sustained a check-off system for taxpayer authorization of appropriations to a presidential election campaign fund which involved no cost to the participating taxpayers. None of these cases stands for the proposition that the use by utilities of their own facilities for the exercise of protected expression, at no cost to their customers, creates a forced subsidy the elimination of which is a compelling governmental interest sufficient to justify the government's prohibition of such use of such facilities.

The Commission's reliance on *Abood* is particularly misplaced. Even though in that case the use of the employees' dues by the union for political purposes resulted in the imposition of higher dues than the employees would other-

wise have paid, the Court indicated that it would be inappropriate to enjoin the union from engaging in political activities, but it might be appropriate for the union to provide an internal remedy by making a pro rata refund of a portion of the dues to those employees who registered their dissent to the use of their dues for political purposes (431 U.S. at 238, 240, 242). Thus, in the case at bar where the inclusion of the bill inserts in the billing envelopes will not cause the utility ratepayers to pay more for their utility service than they otherwise would have paid, it is our view that it is impermissible under the First Amendment to prohibit the utilities from distributing the bill inserts and there is no reason to consider a monetary refund.

The Commission concedes in its brief that "the ratepayer's bill will not be higher if management includes a political bill insert" (Br. at 26). The Commission insists, however, that the utility will receive the benefit of a "subsidized free ride," *id.*, and that this is a sufficient basis to override the utility's First Amendment rights. In effect the Commission contends that it can constitutionally prohibit a utility from expressing its views to its customers in a way that will enable it to save money even though there is no additional expense to its customers; and conversely, if a utility wishes to communicate with its customers on public issues related to its business and to their mutual interests, it can do so only by incurring unnecessary additional costs even though in so doing there is no cost reduction to its customers.

We find no court decision that even suggests that this punitive and uneconomic concept, totally unrelated to the interests of consumer protection which it purports to serve, can be considered as a paramount and compelling governmental interest sufficient to justify an infringement of First

Amendment rights. Furthermore, the Commission refuses to face up to the fact that its ban extends to the use by utilities of all bill inserts to express their views on controversial issues "even when the stockholder pays for it in full" (J.S. App. 43a). Thus, the Commission's argument about a subsidy or free ride is plainly an afterthought because the ban as issued and as it now stands would apply even if the subsidy or free ride were completely eliminated by the absorption of all mailing costs by the utilities' shareholders.

At the end of its discussion of the forced subsidy issue, the Commission advances yet another argument in its attempt to justify the ban, *i.e.*, that the ban is needed to prevent utility managements from gaining an "undue advantage" in violation of the antidiscrimination provisions (Section 65(3)) of the New York Public Service Law (Br. at 31). These provisions are intended to prevent undue discrimination by utilities *among* their customers. *City Ice and Fuel Co.* v. *Public Service Commission*, 260 A.D. 537, 542 (3d Dep't 1940), *motion for leave to appeal denied*, 261 A.D. 847 (3d Dep't 1941). Special Term of Supreme Court held as a matter of state law that these statutory provisions are inapplicable to this case (J.S. App. 27a). Neither the Appellate Division nor the Court of Appeals cast any doubt on the correctness of this holding. (See concurrence in minority opinion of Appellate Division at J.S. App. 22a). Thus, the state law relied upon cannot be considered as creating a governmental interest that would justify upholding the bill insert ban.

Moreover, there is simply no basis in this record for the Commission's conclusion that "use of bill inserts by [utility] management confers an 'undue advantage'" (Br. at 31). In any event, even if the use of bill inserts does give utilities an advantage, the Commission may not constitu-

tionally deprive utilities of that advantage. This Court has made clear that government has no such power. In *Buckley* v. *Valeo, supra,* 424 U.S. at 48-49, the Court said:

> the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"

"Avoidance Of A Public Forum."

Finally, the Commission seeks to justify its bill insert ban by its conclusion that if the utilities are allowed to use bill inserts to express their views on public issues, the billing process will be turned into a public forum that must be opened to other points of view on an equal footing. The Commission fears that it would be difficult to administer fairly such an open access policy (Br. at 32-34).[2]

We disagree with the premise. Under *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), it would be violative of a utility's First Amendment rights for the Commission or any other governmental agency to compel a utility to print and distribute a bill insert expressing views of others with which it does not agree.

The Commission cannot justify its ban by an argument that it is an alternative to some other unconstitutional scheme which is more difficult to administer.

---

[2] A claim of access to Con Edison's billing process was made to the Commission by certain parties in 1976 for the purpose of responding to a bill insert sent out by Con Edison on the subject of nuclear power (A. 23-33). The Commission rejected this claim (A. 49-51), and no appeal was taken by any party. The direct issue of equal access is thus not before this Court on this appeal.

The Commission's reliance on *East Meadow Community Concerts Association* v. *Board of Education,* 18 N.Y.2d 129 (1966), and *Bonner-Lyons* v. *School Committee of Boston,* 480 F.2d 442 (1st Cir. 1973) is misplaced. Both of these cases involved nondiscriminatory access to *government-owned* facilities for expressive activities.

In summary, it is our conclusion that the Commission did not apply the proper standard to any of the justifications it suggests for the bill insert ban. It appears that the Commission adopted a regulatory approach and is satisfied that the ban has a rational basis. This is not enough. In *Thomas* v. *Collins,* 323 U.S. 516 (1945), this Court held that a rational basis will not suffice to justify a restriction on the liberties guaranteed by the First Amendment. The Court said that those liberties have a preferred place in our democratic freedoms and enjoy "a sanctity and a sanction not permitting dubious intrusions" (*id.* at 530). The Court continued (*id.*):

> For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

The Commission's arguments fall far short of this demanding test.

III

The Commission's Ban Cannot Be Sustained on the Ground That It Extends Only to One Manner of Communication.

The Commission argues in Point I.B. of its brief that its bill insert ban leaves open ample alternative channels for communication (Br. at 14-17). The record in this case is to the contrary. Some channels of communication may not be available at all. There are very real questions as to whether television and radio stations would accept controversial messages for fear of incurring Fairness Doctrine obligations by broadcasting a controversial message (A. 16). And as we showed at pages 23-25 of our initial brief, the alternative means of communication which are available involve more cost and less autonomy, are less likely to reach persons not deliberately seeking the information, and may be less effective media for communicating the message than bill inserts. Upholding the ban would unquestionably reduce Con Edison's ability to communicate to its customers on "controversial matters of public policy."

IV

The Commission's Ban Is Unconstitutionally Vague.

Our initial brief contains our argument on this issue (at pages 26-27). We add here our comments on the Commission's argument (Br. at 34-36).

The two cases cited by the Commission do not sustain its position. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), involved a review of the rules and regulations of the Federal Communications Commission pertaining to the fair coverage of public issues by broadcasting stations. The content of these regulations had been defined in a long series of FCC rulings in particular cases (*id.* at 369) and were the subject of thirty years "of consistent administrative construction" (*id.* at 382). This Court, in holding that the regulations were valid, stated that "Past adjudications by the FCC give added precision to the regulations" (*id.* at 395). No such precision is available here.

In *Abood, supra,* involving the pro rata refund to union members of additional service charges for political activities with which they did not agree, the union adopted a voluntary plan for the administration of the refund program. This Court did not pass on the plan (431 U.S. at 242 n.45), and did not decide any question of unconstitutional vagueness.

The Commission is also mistaken in its assertion that Account 426.4 of its Uniform System of Accounts will provide guidance sufficient to overcome the vagueness of its bill insert ban (Br. at 34). There is nothing in the record to support this contention. The Commission points to no interpretations of Account 426.4, and it is apparent that this account is as vague as the Commission's ban.

CONCLUSION

For the reasons stated herein and in our initial brief, the judgment of the Court of Appeals should be reversed and the case remanded with directions that the judgment of the Supreme Court, Albany County, be reinstated.

Respectfully submitted,

JOSEPH D. BLOCK
PETER P. GARAM
4 Irving Place
New York, New York 10003
Tel. No. (212) 460-2777

Attorneys for Appellant

February 1980